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THE LANDLORD AND TENANT ACTS AMENDMENT ACT OF 1957 (QUEENSLAND)

by

S. D. R. Cook

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The *Landlord and Tenant Acts Amendment Act of* 1957 assented to 17 December, 1957, has made important alterations to the principal Act of 1948 in relation both to fair rent and ejectment.

The aim of the Act is to implement the policy of the Queensland Country-Liberal Party Government of making more houses available for letting. This is sought to be done by provisions excluding premises not previously leased during a period of three years from the operation of the Landlord and Tenant Acts, increasing the maximum rentals which may be charged for dwelling-houses and allowing ejectment in specified cases by process under *The Summary Ejectment Act of* 1867, unrestricted by the provisions of Part III of *The Landlord and Tenant Act of* 1948, which enact that notice to quit may only be given on prescribed grounds and that the court shall take into consideration, in addition to all other relevant matters, relative hardship and the availability of suitable alternative accommodation in the exercise of a discretion in making or refusing to make an order for recovery of possession by the lessor.

There are also a number of other amendments which, *inter alia*, add to the list of prescribed grounds for notice to quit in cases still subject to Part III of the principal Act, and make the form of a notice to quit somewhat more elastic in relation to the prescribed grounds and the particulars which must be given of the prescribed ground specified.

The general effect of *The Landlord and Tenant Acts Amendment Act of* 1957 may be dealt with under separate headings as follows:

Exclusion of Premises

Certain premises are excluded from the operation of the fair rents, as well as the ejectment, provisions of the principal Act, namely,

(a) Any premises leased for the first time after 1 December, 1957;

(b) Any premises leased after 1 December, 1957, which were not leased at any time during the period of three years ending on that date.

Fair Rent and Capital Value

The capital value of dwelling-houses for the purpose of fair rent determination by the court prior to the amendment Act was the value on 10 February, 1942, in the case of dwelling-houses existing on that date, and in the case of dwelling-houses not in existence on that date, the value as at the date upon which the erection of the premises was completed (s. 16). By the amendment Act a later date is substituted for 10 February, 1942, namely, 1 July, 1948, thus compromising between one view which holds that landlords should receive a return on their investment based upon present day values and the other which holds that rentals must not be allowed to rise unduly because such a rise would cause inflation. The basic valuation date is applicable to dwellings in existence on 10 February, 1942, and erected before 1 July, 1948. The alteration in the basic valuation date is effective from 1 March, 1958.

The new s. 16(3) may occasion difficulty in interpretation. It provides that: "The Court shall in fixing the fair rent of any dwelling-house, pursuant to this section, disregard the effect on the capital value of that dwelling-house, of the National Security (Economic Organisation) Regulations of the Commonwealth or Part V — Land Sales of *The Profiteering Prevention Act of* 1948." The intention of the legislature appears to be that comparable sales shall be regarded in place of value by consent under Land Sales Control law of Government officials as a criterion in determining fair rents. This section comes into force on 1 March, 1958.

Rent Increase by Notice

A new section of almost universal interest to landlords and tenants of dwelling-houses is s. 20C. This section provides for an increase in rent of an amount up to 20 per cent. in excess of the rent fixed by reference to the date upon which the Commonwealth National Security (Landlord and Tenant) Regulations ceased to be in force or if the premises were not then let, then the rent under the first letting after that date, and also of an amount up to 20 per cent. in excess of the rent fixed by a determination under the Act.

This increase is subject to the express provisions of any lease of the premises for a fixed term which has not expired, and is effected by the simple procedure of service on the lessee of a notice in writing requiring that after the expiration of 14 days from the service of that notice, the rent shall be increased to such an amount as shall be specified in the notice not being more than 20 per cent. of the fixed fair rent. Such a notice may be served after 1 March, 1958. The increased rent then becomes the fair

rent, and the date from which the increase takes effect need not coincide with the last day of a period of the tenancy. Such a variation of the fair rent is not equivalent to a determination for the purposes of s. 23 of the principal Act which prohibits further proceedings for fixing the rent until after a period of twelve months from the time when the rent was fixed by a determination.

Ejectment

(1) Premises excluded from the operation of Part III of *The Landlord and Tenant Act of* 1948, are —

(a) Any premises leased for the first time after 1 December, 1957;

(b) Any premises leased after 1 December, 1957, which were not leased at any time during the period of three years ending on that date;

(c) Any premises leased after 1 December, 1957, where the parties to the lease have agreed in writing that Part III of *The Landlord and Tenant Act of* 1948 shall not apply (but only for the purpose of the particular lease), (s. 2).

The effect of the exclusion of these lettings from the operation of Part III of the principal Act is that the process for ejectment of the tenant in such cases will be by the less formal notice required at common law for determining the tenancy, followed by the issuing of an information under *The Summary Ejectment Act of* 1867, and issue of a summons under *The Justices Acts,* 1886 *to* 1949. Considerations of hardship and alternative accommodation will not be relevant at the hearing. *The Summary Ejectment Act* is an Act for the speedy recovery of the possession of tenements unlawfully held over, and it is applicable where a term of years or any less estate or interest shall have expired by effluxion of time or shall have been determined by notice to quit or demand of possession: (s. 2), but it is not applicable where the tenancy has determined by forfeiture for breach of covenant (*Loynes* v. *Hanman,* [1922] St.R. Qd. 220). Costs may be allowed under the Summary Ejectment Act.

A minimum period of notice to quit of 28 days must be given to the lessee of a dwelling-house in each of the above-mentioned classes (a), (b) and (c), provided that the lessee duly pays the rent and otherwise performs the conditions of the lease, and provided also that a longer notice to quit is not provided for in the lease.

New prescribed grounds — notice to quit

In the case of prescribed premises other than those comprised in classes (a), (b) and (c), notice to quit may still only be given to the lessee upon one or more of the prescribed grounds.

The Amendment Act of 1957 adds to these a number of new grounds as follows:

"(p) (i) That the lessee, without just cause or excuse has parted with possession of the premises being a dwelling-house without the consent or approval of the lessor; or

(ii) That the lessee, without just cause or excuse not having parted with possession of the premises being a dwelling-house, has, without the consent or approval of the lessor ceased for a period exceeding three months to be a bona fide occupant of the premises;

(q) Where the premises are let as a shop or business premises and have been converted by the lessee without the consent of the lessor, either express or implied, from a shop or business premises into a dwelling-house.

Grounds and particulars

Section 45 of the principal Act formerly provided that a notice to quit shall specify the ground relied upon and shall give the particulars thereof and in the proceedings, the lessor shall not be entitled to rely upon any ground not so specified. This section has been amended so as to allow a lessor, by leave of the court to rely on a ground not specified in the notice to quit, and on a ground of which particulars have not been given (s. 8).

Substituted service of notice to quit

Section 41 is amended to provide that where for any sufficient cause the service of any notice to quit cannot be effected, a court having jurisdiction to hear and determine the matter of recovery of possession of the premises may, upon an affidavit showing grounds, make such order for substituted or other service or substitution for service of notice by advertisement or otherwise as it may deem proper (s. 41(4A)); also by s. 41(4B)(i):

Where a lessee of prescribed premises has died and probate or letters of administration of his estate have not been granted any notice to quit which might have been given to the legal personal representative of the deceased lessee had probate or letters of administration of his estate been granted may be given by affixing the same to the premises and

(a) Where any person or persons are apparently residing in or in occupation of the premises — by delivering the notice to any of such persons apparently over the age of sixteen years;

(b) In any other case — by giving notice of the same twice in a daily newspaper circulating in the district in which the premises are situated; and by s. 41(4B)(ii): Where any proceedings for an order for the recovery of possession of any prescribed premises are taken in reliance on any notice to quit given in the manner provided in subparagraph (a) of paragraph (i) of this subsection, any occupant of the premises or other person claiming an interest therein shall be entitled to be heard in the proceedings. The contesting of any such proceedings shall not of itself be regarded as an act of administration or as intermeddling in the estate of the deceased lessee or as constituting the person so contesting any such proceedings executor *de son tort* of the deceased lessee.

Reconstruction or demolition

It has been held that "reconstruction or demolition" does not include the removal of a dwelling-house and its re-erection on other land. (*Nelson* v. *Healey*, [1948] V.L.R. 415). To meet this position, section 41(5)(m) has now been amended to include "removal" as well as "reconstruction and demolition" as part of the prescribed ground.

Dwelling-house of mentally sick person

The amending Act inserts a new section, 62A which provides that where the Public Curator has leased a dwelling-house —

(a) Forming part of the estate of a person who at the time when the lease was granted was a mentally sick person within the meaning of *The Mental Hygiene Act of* 1938; and

(b) Which was the residence of such person before he became a mentally sick person within the meaning of that Act,

the provisions of Part III of the principal Act shall not, in respect of that lease, apply to the dwelling-house.

Certificate as to holiday premises

Another innovation by the amending Act is the provision in the new s. 64A that the registrar of the Fair Rents Court may upon application grant certificates that premises are holiday premises and that such a certificate granted and in force shall in any proceedings under or for the purposes of The Landlord and Tenant Act or *The Summary Ejectment Act of* 1867, be prima facie evidence that the premises described therein are holiday premises within the meaning of the Act.

This provision should facilitate the just administration of the provisions of the principal Act making the determination of the fair rent of holiday premises subject

to special considerations (s. 18), and excluding holiday premises from the definition of "prescribed premises," which are subject to the restrictive operation of Part III, relating to eviction (s. 7).

Holiday premises

The definition of "holiday premises" has been re-drafted. An alteration of interest to many lessors will be the inclusion within this definition of premises formerly excluded, namely those which at any time during the period from 1 March, 1945, until the passing of the *Amendment Act of* 1957 had been leased to or occupied by any lessee for a continuous period exceeding three months (s. 3). The general principle is retained that "holiday premises" are dwelling-houses which since 1 March, 1945, have ordinarily been leased for holiday premises only and were not at the date of the passing of the *Amendment Act of* 1957, leased for purposes other than holiday purposes. Premises excluded from the definition are those which at any time after the date of the passing of *The Landlord and Tenant Acts Amendment Act of* 1957, are ordinarily leased for purposes other than holiday purposes, or are leased to or occupied by any lessee for a continuous period exceeding three months.

Generally

The principal amendments are of wide effect and will have a material influence on the lives of many landlords and tenants.

In a few words, the substantial effect of *The Landlord and Tenant Acts Amendment Act of* 1957 is to confer two important new rights on landlords:—

(1) In the case of premises newly leased or freshly leased after three years' interval after 1 December, 1957, the removal of rent control and restriction on eviction, subject to the giving of 28 days' notice to quit in the case of a dwelling-house. Restrictions on eviction may also be excluded, in respect of lettings after 1 December, 1957, except in the case of premises let for the first time or not let during the preceding three years, by agreement in writing of the parties. The radical change in policy of the amending Act is underlined by comparison of the above provision with s. 65 of the principal Act which provides: "Any contract or arrangement, whether oral or in writing, the purpose or effect of which is either directly or indirectly to defeat, evade or prevent the operation of any of the provisions of this Act shall be absolutely void and of no legal effect whatsoever."

(2) Another important right conferred by the amending Act on landlords is the right to increase by unilateral

act the fair rent of dwelling-houses already let, i.e. by service of notice in writing on the tenant requiring him to pay an increase of an amount of up to 20 per cent. of the existing fair rent.

Whilst the effect of the amending Act is wide, its intent is clear and it may not cause many problems, in advising clients on its effect. The department of Justice has published a brochure briefly explaining its provisions.

SICK LEAVE

A striking lesson in keeping the upper lip stiff is given in a recent number of the weekly bulletin of the Federation of Civil Engineering Contractors, which prints the following letter from a bricklayer in Barbados to the firm for whom he worked:

Respected Sir,

When I got to the building, I found that the hurricane has knocked some bricks off the top. So I rigged up a beam with a pulley at the top of the building and hoisted up a couple of barrels full of bricks. When I had fixed the building, there was a lot of bricks left over. I hoisted the barrel back up again and secured the line at the bottom, and then went up and filled the barrel with extra bricks. Then I went to the bottom and cast off the line. Unfortunately, the barrel of bricks was heavier than I was, and before I knew what was happening the barrel started down jerking me off the ground. I decided to hang on and half-way up I met the barrel coming down and received a severe blow on the shoulder. I then continued to the top, banging my head against the beam and getting my fingers jammed in the pulley. When the barrel hit the ground it bursted its bottom, allowing all the bricks to spill out. I was now heavier than the barrel, and so started down again at high speed. Half-way down I met the barrel coming up, and received severe injuries to my shins. When I hit the ground I landed on the bricks, getting several painful cuts from the sharp edges.

At this point I must have lost my presence of mind, because I let go the line. The barrel then came down, giving me another heavy blow on the head and putting me in hospital. I respectfully request sick leave.

—*The Manchester Guardian Weekly.*

Australian Conveyancer and Solicitors Journal, February, 1958

THE TAVERN LAMP STILL BURNS

by

J. P. BOURKE, Q.C.

The recent discovery of the first register of the Court of Petty Sessions at Melbourne containing an entry of a charge against John Pascoe Fawkner for a breach of the Licensing Laws on 12 May, 1838, for "not having a lamp burning over the door of his licensed public house" highlights the anachronistic state of Victoria's present liquor laws. The provision in question is a Victorian heritage from pre-separation days when Victoria formed part of the Colony of New South Wales. Upon separation it became part of the law of the State of Victoria, which from 1852 onwards proceeded to deal frequently with the control of licensed houses and the regulation of the supply and sale of liquor generally. Some sixty liquor Acts have been passed in a period of just over 100 years.

First Court of Petty Sessions

The first Court of Petty Sessions opened on 17 July, 1838. Fawkner's Prosecutor was Henry Batman, Chief Constable. The case was dismissed. It may not be without significance that the informant was dismissed for bribery on 5 August, 1838. Fawkner was a powerful figure in the young community, not hesitating to use his newspaper "Advertiser" for his own purposes. Fawkner's first tavern and store was opened in 1835 in William Street on the present site of the offices of the State Electricity Commission. It was built of turf or sods with a portion of wood. The apartments were of very primitive order. The licensee served "bad rum and water." On 2 July, 1838, Fawkner opened a new tavern in Market Street near the present site of the A.M.P. building. It possessed "a square pyramidal roof bearing some resemblance to a half open umbrella with the whalebone slightly out of order." According to a contemporary, it possessed an excellent library and reading room but the sleeping accommodation left a good deal to be desired. The bedroom occupied by this gentleman was something like a barn loft containing eight beds all in use — and fleas!

Keep a lamp affixed over entrance

The Licensing Act still requires that "every licensed victualler holding a licence in respect of any premises shall unless the street or road in front of his licensed premises is sufficiently lighted at the expense of the ratepayers keep a lamp affixed outside of and near or over the front or principal entrance of his licensed premises or within twenty feet of and in front of and opposite to such principal entrance lighted during the whole of every night from sunset to sunrise during the time of his holding

any such licence."[1] As it has been held that an electric light pole is not a lamp post it is problematical whether an electric light is a lamp within the meaning of the Section and it would seem, therefore, that to be on the safe side, a publican in Bourke Street or Collins Street must keep amid the surrounding neon signs and vapor lamps a fitting to which he can affix a gas, kerosene or brush lamp, in case the ratepayers fall down on their task of keeping the vicinity of the hotel sufficiently lighted, whether due to coal shortages, industrial disturbances or otherwise.[2]

Provendor for travellers

The same Section requires a Licensed Victualler whose licence is granted in respect of premises to be provided with stabling "to keep a sufficient supply of hay, corn or other provendor for the use of travellers" (which presumably means the travellers' horses or oxen). There is no requirement for the installation of garages or petrol bowsers. The Licensing Act abounds in such curious survivals. There is, for example, a penalty of £5 upon every licensed victualler whose premises are not situated within two miles from any morgue or Police Station for refusing to receive any dead body for the purpose of an inquest being held thereupon.[3] For providing for such deceased "guest" the Licensee is entitled to £1.

Unlawful assemblies

Penalties still subsist for permitting any unlawful assemblies in hotels. The unwanted bodies, which are clearly to be distinguished from these referred to in the earlier paragraph, are any body, union, society, or assembly declared to be illegal or which require an illegal oath before admission or who observe in the matter of the admission of their members of any religious or pretended religious or other rite or ceremony not sanctioned by law or carry any arms or flags or emblems. Freemasons, Foresters, Free Gardeners, Ancient Druids and Odd Fellows are specifically exempted from the operation of the Section.[4] The Section dates from the early colonial days and the reasons for its enactment would make an interesting study for a student of Australian History.

Recent anomalies

Even recent amendments to the law have resulted in anomalies. Before 1953 it was illegal to open a bar door after 6 p.m. even to enable the staff to go home. Now it is permissible to open the door after 6.15 p.m. to enable the Licensee or his employees to enter the bar to clean it or

[1] Licensing Act, 1928, s. 211.
[2] See *Hubbard* v. *Moore*, [1935] V.L.R. 93.
[3] Licensing Act, 1928, s. 214.
[4] Licensing Act, 1928, s. 209.

for cognate purposes and to re-open it to allow them to leave after they have performed these services, but it is not permissible to open the bar door to enable a licensee or his employees to leave after they have performed these services unless it has first been opened to enable them to enter the bar for that purpose.[5]

Customers who have been served before 6 o'clock in a bar room, which means any room in which liquor is kept and in which or through any opening in which liquor is served directly to the public have a quarter of an hour's grace in which to consume their liquor. But if they happen to be in a lounge or a beer garden which is not a bar room they must finish their liquor at 6 p.m. at their peril.

Compensation

Of more economic significance are the outmoded provisions relating to compensation payable to Licensees who have surrendered or who have been deprived of their licences. It is the duty of the Licences Reduction Board, which is a separate body composed of the members of the Victorian Licensing Court, to make a valuation on a fair and equitable basis of the maximum amount of compensation payable in respect of Victoria's licensed premises. Such compensation is payable to the owner by reason of the value of his premises being diminished and to the occupier owing to loss of business. In the case of the owner the Board is required to determine the difference between fair average capital value of premises as licensed during the ten years ended on 31 December, 1916, and the fair probable average capital value without a licence during the same period. The amount payable to a licensee is based on the fair average value of a lease of the licensed premises for any term of three years during such period of ten years.[6] It is obvious that with the difference in monetary values and the changed economic conditions since 1916 such compensation must fall far short of fair recompense. To enable such compensation to be paid a fee is levied on all licensees amounting to 6% on the amount paid by them for all liquor supplies. During the financial year 1955-1956 £2,277,704 was paid into the consolidated revenue for this purpose and no sum was paid out. The Act really requires a comprehensive overhaul. Amendments to the Licensing Act have left the Court consisting of a Judge and two magistrates manfully struggling to do the work of five men. Already there is a lag of more than three years in the hearing of some applications for Licences. Some applicants for new licences who lodged their applications in 1954 will be lucky to have them heard before 1959.

[5] Licensing Act, 1953, s. 26.
[6] Licensing Act, 1928, s. 282.

THE UNKEMPT TOMB*

A Note on Gifts for the Upkeep of Graves

Testators frequently (and donors occasionally) desire to make provision for the maintenance of their graves and the graves of their relatives, but often fail to consider the intricate legal rules which affect such provisions. In particular, confusion arises as to relevance of the perpetuity rules and as to the extent to which an obligation to maintain a grave is moral only. As a result, a direction is often unnecessarily limited to the perpetuity period or declared to be only morally binding. Again, a failure to observe the perpetuity period will sometimes defeat the testator's intention altogether.

A direction to maintain a grave is almost always placed in the context of a trust of some kind. There is, however, no such thing as a simple "trust" to maintain a grave, at least if the concept of the trust is to be restricted to that which is enforceable at the instance of a beneficiary, for the maintenance of a grave (not forming part of the fabric of a church) is not a charitable object, and therefore there is no one to enforce it. An attempt to create a simple trust with this object in view will in any event be invalid unless it is limited to the perpetuity period. If it is so limited it will be unenforceable but valid. This means that the trustees may perform the trust if they so choose; but, if they do not so choose, the trust moneys will fall into residue.

Testators, who generally realise the futility of the simple "grave trust," sometimes try in one way or another to give more force to their intentions by grafting a "grave trust" on to some charitable trust. But if they think thereby to create a perpetual legal obligation to maintain a grave they will lead themselves astray, because the law will only admit a moral obligation in this connection, and it is in this class of case only that expressions should be used to the effect that the testator desires to impose merely a moral obligation, it being, perforce, the only obligation he can impose. This class of case is divided into two groups, according to the habits of testators in the past. The first group is where the testator gives a fund to trustees upon trust to apply the income in maintaining a grave, and as to any remainder, balance or surplus of the income for a valid charitable purpose. The effect of the decisions is that the whole of the income will be devoted to the charitable object for which the testator only intended the remainder, balance or surplus, the prior direction to devote the income to the maintenance of the grave being disregarded. Thus, in *In re Rogerson* 84 L.T. Rep. 200, 201; [1901] 1 Ch. 715,

*By Courtesy of the *Law Times*.

719 JOYCE, J., said: "Testators who make bequests of this nature, if they know the law, really mean the legacy to go to the objects of the charitable bequest with a moral obligation to keep up the tomb." The same rule applies, of course, even if the testators do not know the law. This is, it should be noted, an exceptional rule and only applies where the prior direction is in respect of the maintenance of a grave. A prior direction in favour of some other non-charitable object will be treated differently. The exceptional nature of the rule respecting graves was pointed out by JENKINS, J., in *In re Coxen (deceased)*, [1948] 2 All E.R. 492, a case not specifically concerned with "grave trusts."

The second group of cases where a testator is allowed to impose a moral obligation but not a legal obligation is where he gives a fund to trustees upon trust to apply the income in keeping a graveyard or churchyard in repair (a valid charitable trust) and adds a direction that the trustees shall keep in repair "in particular the graves of" certain designated persons of a class too limited to accommodate a charitable intention, e.g. named relatives of the testator. In this case the direction with respect to the particular graves is construed as imposing an ancillary obligation to, or designating a mode of performance of, the primary obligation, which does not trench against the provisions of the main trust. Thus, in *In re Manser* 92 L.T. Rep. 79, 81; [1905] 1 Ch. 68, 75 WARRINGTON, J., said, the case being exactly in point: "There is one point which I have not dealt with, and that is with regard to the words 'in particular the grave of my late wife.' I regard these words as nothing more than a special obligation ancillary to the repair of the burial grounds, and not as a separate trust at all." A similar view was taken by EVE, J., in *In re Eighmie* 153 L.T. Rep. 295; [1935] Ch. 524.

It will be seen then that any attempt to create a direct obligation to maintain a grave by means of a trust will never be allowed legal effect, but may be permitted to have a "moral" effect, which is, of course, beyond the control of the courts.

There is, however, one device which can successfully cope with the testator's desires in this respect. It is a device which provides a permitted and a perpetual inducement to beneficiaries to maintain a grave. This is where the testator establishes a trust involving an original gift to charity, conditional upon the maintenance of a grave, with a gift over to another charity in the event of a failure to observe the condition. It is clear that there is no trust or obligation to maintain the grave: the device simply designates a time when the gift over is to take effect, and the original beneficiaries are thereby induced to observe the

condition in order to postpone the operation of the gift over. It is the duty of the trustees from time to time, or as the testator directs, impartially to consider whether the condition has been observed, and, if it has not, to give effect to the gift over. They must, by their office, do equal justice between the two sets of beneficiaries, and therefore they must see that the gift over operates at the proper time. It is certainly no part of their duty to set aside any portion of the trust moneys for the maintenance of the grave: indeed, that would not only be a breach of the testator's charitable intention in respect of the original gift, but it would also amount to a denial of the rights of the beneficiaries under the gift over, which would never operate if the trustees themselves ensured the observation of the condition. Again, the original beneficiaries are under no obligation to maintain the grave — self-interest is the sole motive which inspires them to do so, and it is the sole motive with which the testator, if he knows the law, intends to furnish them.

No reference should be made, in the employment of this device, to the perpetuity period. It is settled that a gift over from one charity to another may take effect at any time: see *In re Tyler* 65 L.T. Rep. 367; [1891] 3 Ch. 252. If, therefore, the gift over is limited to take effect within the period, then the testator's desires for the maintenance of the grave are also limited to that period, and so are the trustees' duties. If, however, the testator wishes the gift over to operate in favour of a private named individual, he must limit the time of operation to the perpetuity period — *In re Bowen* 68 L.T. Rep. 789; [1893] 2 Ch. 491 — but if he does so the condition will only be effective for the period and the gift over will never vest if the condition is observed for the period. If he fails to limit it for the period, however, the gift over will fail. Where a gift over fails, the moneys will be diverted to two possible destinations: either they will fall into residue (or revert to the donor) at the designated time — see *In re Randell*, (1888), 58 L.T. Rep. 626; 38 Ch. D. 213 and *In re Blunt's Trusts* 91 L.T. Rep. 687; [1904] 2 Ch. 767 — or the original beneficiaries will retain the moneys discharged of the condition: see *In re Peel's Release* 127 L.T. Rep. 123; [1921] 2 Ch. 218. The determination of the correct destination of the moneys is a matter of the construction of the terms of the original gift, and the rules in this respect are incomplete: see *In re Talbot* 149 L.T. Rep. 401; [1933] Ch. 895. The wiser course is to avoid these pitfalls by leaving the gift over to charity.

A number of practical considerations will, however, be taken into account by the discriminating testator who employs this device. No charity can be expected to take a

great interest in a legacy of £50 saddled with a condition of this kind; and no trustees want the burden of having regularly, and perhaps for ever, to ascertain the condition of certain graves, in order to fulfil probably the last remaining duty of their office. It is not, in short, enough for the testator to hold the cards, he must also play them with skill. His ace will be played first: his gift will be a generous one — anything under £200 is paltry — so that the charity concerned will feel it to be worth its while to accept it and to arrange for the observance of the condition. Then, he will appoint the same charity to be trustee, so that it will look after the rights of the beneficiaries under the gift over: this appointment the charity will accept, if the gift is generous. As most charities are corporations, there will rarely be any succession difficulties. Lastly, he will lay down a standard of inspection of the graves, so that the trustees will not be over-awed by their duty. This could take the form of a direction that, for instance, the annual certificate of the incumbent and churchwardens of the parish in which the grave is situated, or of an official of the relevant burial authority, or of a surveyor, shall be sufficient evidence of the matter to which it relates.

If a testator so moves, the fulfilment of his desires will be practically, as well as theoretically, secured. It may be recalled that the appointment of beneficiary to be trustee will involve a conflict of interest and duty. This is so. But most charities are at least as highly principled as private trustees, and often know their obligations far better. The testator can, however, easily banish any doubt he may have by directing his executors to inform the beneficiaries under the gift over of their interest. If the gift is generous, the ultimate beneficiaries will no doubt visit the appropriate cemetery from time to time to see if their ship has come home! Often ultimate beneficiaries are totally ignorant of their interest under legacies of this kind.

It seems proper, as a footnote, to add a word about the payment of income tax in connection with gifts of the kind discussed. The income of the trust fund should be devoted entirely to the charitable purposes for which it is intended. If it is, any tax paid upon it will be recoverable by the charity. However, if any portion of the income is devoted to the maintenance of the grave, that portion will bear tax. If the charity wishes, therefore, to spend money on the maintenance or repair of the grave, it should try to use moneys from its other income which have already been taxed, and which may, therefore, be devoted to non-charitable objects within the normal activity of the charity. Most charities have some income upon which irrecoverable tax has been paid.

CASE NOTES

BUILDING CONTRACT

Agreement to sell land together with dwelling-house to be erected the same as house inspected by purchaser — cracks due to faulty foundations, damages for breach of contract.—A builder agreed to sell to a purchaser a parcel of land together with a residence to be erected thereon exactly the same as a residence inspected by the purchaser. After the purchase had been completed and the purchaser had gone into occupation, serious cracks developed owing to the sand upon which the house was erected not having been previously consolidated. The purchaser claimed damages from the builder for breach of contract. It was held that it was an implied term of the contract that the house would be erected in a workmanlike manner and judgment was entered for the plaintiff for a sum based upon the amount of depreciation to the property (*Hannan* v. *Fyfe and Fyfe,* [1957] S.A.S.R. 90).

CHARITY

Gift to religious body for relief of need and distress and in particular for relief of persons adversely affected by second world war — construction — validity.—A testator bequeathed his residuary estate to a religious body "to be employed by them in relieving cases of need and distress and in assisting persons in indigent circumstances and in particular (but not exclusively or in any way that shall limit their discretion) in assisting and relieving persons who have been or shall be adversely affected by the second world war." On appeal from a judgment that the trusts of the will were valid, it was argued that the provision in respect of persons adversely affected by the second world war rendered the whole bequest void. The provision was, however, construed as merely giving a special example of persons in need or in distress and of persons in indigent circumstances, and the whole trust was held to be a trust for the relief of poverty, and therefore a valid charitable bequest (*Muir* v. *The Open Brethren* (1956), 96 C.L.R. 166).

WILL

Construction — Gift of "all monies" from firm of share-brokers — whether debenture stock included therein — gift to legatee "for her own use and what is left at her death for distribution to some mission to poor and needy at her discretion."—A testatrix by her will gave a legatee "all monies from Savings Bank or S. C. Ward & Co. who hold shares and debentures, etc., also all furniture goods

and chattels owned by me at my death for distribution to some mission to poor and needy at her discretion." It was held that since *Perrin* v. *Morgan*, [1943] A.C. 399 a court was not bound to hold that "money" meant money in the strict sense when it appeared that a wider meaning was intended, and that debenture stock held by the sharebrokers was included in the gift to the legatee. It was also held that the legatee took a life interest in the property given to her with power to dispose of the whole or any part thereof in her lifetime, and that the ultimate gift was a valid charitable bequest and the legatee had power to select or appoint to the particular mission, though her choice was limited to one for the poor and needy (*In the Estate of Hannah Raw Ward, deceased*, [1957] S.A.S.R. 125).

Construction — Gift of half share in partnership — whether money to credit of testatrix in current account of partnership included.—A testatrix by her will gave to her son all her "half share in the partnership." At the date of her death money was standing to her credit in the current account of the partnership, in addition to her half share in the capital account. It was held that the amount on current account in the partnership to the credit of the testatrix was not included in the gift of the half share in the partnership (*Re Lanyon, deceased, Bagot's Executor and Trustee Co. Ltd.* v. *Lanyon*, [1957] S.A.S.R. 135).

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TABLE OF CASES.

DIRECTORY OF REAL ESTATE AGENTS, AUCTIONEERS AND VALUERS

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E. F. FRIPP & CO.
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Post Office Chambers,
170 Burwood Road.
UJ2112.

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Branches—Belmore, Punchbowl, Beverly Hills. Probate Valuers.
LF3431-2.

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KINGS CROSS

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Real Estate Agents, Auctioneers and Valuers.
FL4021.

LANE COVE

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189 Longueville Road.
JB2357, JB1417.

MARRICKVILLE

C. H. C. SETON & CAMERON.
Established 40 years.
357 Illawarra Road.
Values made for Probate.
LL3241-2.

MOSMAN

CHAMBERS, K. B., L.R.E.A.
523 Military Road.
Estate Agents.
XM7485.

NEUTRAL BAY

CROLL & CO.
179 Military Road.
Real Estate Agents, Homes and Investments.
XY1311, XY1312.

PETERSHAM

A. H. TAYLOR.
Real Estate Agent,
Auctioneer and Valuer.
448 Parramatta Rd., Petersham.
Valuations for Probate.

STRATHFIELD

HARRY HIBBLE & SONS.
Opp. Station.
Property Management, Sales, Valuations.
UM8360, UM7979.

SYDNEY

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98 Pitt Street, Sydney.
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BW8401 (10 lines).

HOBART, TASMANIA

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7487-8.

W. E. Smith Limited, Webb & Boundary Streets, Croydon.